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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of	)	Arizona Supreme Court No.
	)	R-
<b>PETITION TO AMEND</b>	)	
<b>TERMINOLOGY SECTION AND</b>	)	
<b>RULES 7 &amp; 9(e), RULES OF THE</b>	)	
<b>COMMISSION ON JUDICIAL</b>	)	
<b>CONDUCT</b>	)	

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Pursuant to Rule 28, Arizona Rules of the Supreme Court, the Commission on Judicial Conduct [“Commission”] petitions the Court to adopt amendments to the Terminology Section (definition of “Public Member”) and Rules 7 and 9(e), Rules of the Commission on Judicial Conduct, as proposed below.

**I. Terminology Section (Definition of “Public Member”)**

A. Introduction and Background

The composition of the Commission is prescribed by the Arizona Constitution, Article 6.1, Section 1(A), which states:

A commission on judicial conduct is created to be composed of eleven persons consisting of two judges of the court of appeals, two judges of

the superior court, one justice of the peace and one municipal court judge, who shall be appointed by the supreme court, two members of the state bar of Arizona, who shall be appointed by the governing body of such bar association, and three citizens who are not judges, retired judges nor members of the state bar of Arizona, who shall be appointed by the governor subject to confirmation by the senate in the manner prescribed by law.

The Terminology section of the Rules of the Commission on Judicial Conduct provides a definition for public member but does not define either an attorney member or a judicial member of the Commission. Under the Terminology section, “Public member” is defined as “a member of the commission who has never been a judge or an attorney.” This definition is inconsistent with the definition as set forth in the Arizona Constitution, which states that the citizen is not currently a judge, retired judge, nor a member of the State Bar of Arizona. The Constitution does not prohibit a former lawyer who is no longer a member of the State Bar of Arizona or someone who is licensed as an attorney in another state from serving as a public member.

B. Current Definition

“Public member” means a member of the commission who has never been a judge or an attorney.

C. Proposed Abrogation of Definition of Public Member

For reasons unknown, the Terminology section of the Rules of the Commission on Judicial Conduct does not separately define the attorney member

and judicial members of the Commission. The current definition of public member is inconsistent with the requirements of the Arizona Constitution. The constitution speaks for itself, and therefore, the Commission proposes to abrogate the definition of public member from the Terminology section.

~~“Public member” means a member of the commission who has never been a judge or any attorney.~~

## **II. Rule 7 (Misconduct Distinguished from Error)**

### **A. Introduction and Background**

The current version of Rule 7 has been in the Commission’s Rules since approximately 2001. Prior to that, similar language appeared as a subsection to Rule 5. In 2009, the current Code of Judicial Conduct was adopted, based on the 2007 Model Code from the American Bar Association. Prior to 2009, the last substantial revision to the Code was in 1993. The current version of the Code contains the following provisions:

#### **Rule 2.2 (Impartiality and Fairness)**

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

#### **Comment 3**

A good faith error of fact or law does not violate this rule. However, a pattern of legal error or an intentional disregard of the law may constitute misconduct.

The 1993 version of the Code did not contain language similar to that found in Comment 3, and thus, may explain why similar language was contained in the Commission's Rules.

The current version of the Code has incorporated the requirements of Rule 7, and the Code is what establishes standards for the ethical conduct of judges. Therefore, the inclusion of such language in Rule 7 is now duplicative. Additionally, Rule 7 imposes an abuse of discretion standard, which is better left reserved to the appellate process than the judicial disciplinary process, which may not involve all parties to an underlying proceeding.

B. Current Rule

Rule 7 presently states:

The commission shall not take action against a judge for making erroneous findings of fact or conclusions of law in the absence of fraud, corrupt motive, or bad faith on the judge's part, unless such findings or conclusions constitute such an abuse of discretion as to otherwise violate one of the grounds for discipline described in these rules or the code.

C. Proposed Abrogation of Rule 7

For the aforementioned reasons, the Commission proposes to abrogate Rule 7 because the concepts expressed therein have been incorporated into the Code of Judicial Conduct.

## Rule 7 [Abrogated]

~~The commission shall not take action against a judge for making erroneous findings of fact or conclusions of law in the absence of fraud, corrupt motive, or bad faith on the judge's part, unless such findings or conclusions constitute such an abuse of discretion as to otherwise violate one of the grounds for discipline described in these rules or the code.~~

### III. Rule 9(e) (Press Releases)

#### A. Introduction and Background

The Commission's cases can be divided into two categories – informal or formal. Informal cases consist of complaints that are dismissed, either with or without comments, or complaints that result in the imposition of a public reprimand. Formal cases consist of complaints that result in the filing of a formal statement of charges, and although the full range of sanctions is available to the Commission, these cases typically result in the imposition of a formal sanction - censure, suspension, or removal. Formal charges are reserved for the most serious conduct that violates the Code of Judicial Conduct. However, often times a complaint involving serious conduct that would otherwise warrant formal charges may be resolved informally, such as where the judge agrees to resign or retire and not seek judicial office in the future in exchange for the Commission dismissing the complaint. In many instances, although these resolutions result in dismissals, the Commission authorizes the disposition to be public under Commission Rule 9(c).

Currently, under Commission Rule 9(e), the Commission is limited to issuing press releases for the purpose of informing the public regarding formal proceedings. However, the Commission believes there are other instances where a press release may be warranted in the interests of transparency and public confidence in the judiciary. For example, if a judge is convicted of a criminal offense, and he/she agrees to resign and not seek judicial office in the future, in exchange for an informal sanction, or the dismissal of the complaint, the public announcement of this resolution is in the interests of transparency and ensuring public confidence in the judiciary. However, under the current rule, the Commission would not be permitted to issue a press release as formal charges were not initiated. Additionally, the Commission may wish to issue a press release to confirm it has initiated an investigation into a matter that has received substantial media coverage. By comparison, when there was significant public backlash to the decision of California Judge Aaron Persky over his sentence for the Stanford University swimmer, the California Commission on Judicial Performance was inundated with complaints (in excess of 6,000). Ultimately, this came down to a disagreement with the judge's legal ruling, and California closed its investigation with no charges or discipline, but it did so with a detailed press release and statement regarding its reasoning. While Arizona has been fortunate not to have had a similar situation, the possibility that one could arise in the future exists. Thus, having a rule that allows for press releases

in matters other than formal proceedings would be helpful to continue to instill transparency in the Commission's proceedings.

In 2017, the Commission amended its administrative policies (Policy 11 of the Administrative Policies of the Arizona Commission on Judicial Conduct) to set forth specific instances in which Commission staff should issue press releases, including a catch-all provision for "other circumstances as deemed appropriate by the commission chair." Unfortunately, the policy is more permissive than the rule, and the rule takes precedence over the policy. Therefore, the Commission seeks to amend the rule to conform to the language of the policy.

B. Current Rule and Administrative Policy

Commission Rule 9(e) presently states:

(e) Press Releases. Commission staff may issue press releases for the purpose of informing the public regarding formal proceedings.

Administrative Policy 11 presently states:

Press releases shall be issued by commission staff within a reasonable period of time after the following events:

- (1) After a judge files a Rule 25 response to formal charges.
- (2) After a hearing date has been set to hear the charges set forth in a statement of charges (including hearings requested to contest a public reprimand).
- (3) After the commission and a judge have entered into an agreement to resolve impending or pending formal charges by resignation or retirement of the judge.
- (4) After the commission, a hearing panel, or a hearing officer has issued a decision in a case that is not subject to further review by the Arizona Supreme Court.

(5) After the Arizona Supreme Court has approved recommended discipline by consent.

(6) After the Arizona Supreme Court has issued a decision in a case subject to its review under Commission Rule 29.

(7) The commission may also issue press releases in other circumstances as deemed appropriate by the commission chair.

The complainant, respondent judge, or counsel if represented, and the commission will be provided a copy of the press release.

C. Proposed Rule

The Commission proposes that Commission Rule 9(e) be amended to state:

Commission staff may issue press releases for the purpose of informing the public regarding formal proceedings, investigations that have become public, or in other circumstances as deemed appropriate by the commission chair.

**IV. CONCLUSION**

Wherefore, the Commission requests the adoption of the proposed rule change.

DATED this 29<sup>th</sup> day of May, 2019.

**COMMISSION ON JUDICIAL CONDUCT**

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